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Supreme Court, U.S.
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No. 04-376

IN THE

Supreme Court of the United States

LEON WOLFORD,

Petitioner,

v.

MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where Petitioner raises no issues of law, no conflict among the Circuits, and no impact beyond the immediate parties, and instead raises only a fact-based question of sufficiency of the evidence, should this Court grant a writ of certiorari to review the Sixth Circuit's routine exercise of its appellate authority under Fed. R. Civ. P. 50 to review a fraud verdict for sufficiency of the evidence?

2. Where Petitioner ignores the fundamental evidentiary failure of his fraud case; provides the Court with an egregiously incomplete and misleading discussion of the complex record below; asserts new fraud theories that were never presented to the jury and which are not supported by sufficient evidence; and fails to advise the Court of numerous other grounds supporting reversal of the jury verdict, should this Court grant a writ of certiorari and/or summarily reverse the Sixth Circuit's unreported decision?

RULE 29.6 CERTIFICATION

Pursuant to Rule 29.6, Respondent Massachusetts Mutual Life Insurance Company ("MassMutual") certifies that it has no parent companies and that no publicly held companies hold 10% or more of any of its stock or otherwise is financially interested in the outcome of the proceeding. MassMutual is a mutual insurance company owned by its policyholders.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Certification	ii
Table of Contents	iii
Table of Cited Authorities	v
Response to Statement of the Case	1
A. The Termination Of Petitioner's Agent And Broker Contracts By Massmutual.	1
B. The Proceedings Below And Related Proceedings.	8
1. The Complaint And The Trial Evidence.	8
2. The Jury Verdict.	12
3. New Evidence.	13
4. The Sixth Circuit.	15
Reasons for Denying the Petition	17
A. The Petition Does Not Present Any Issue Of Law Warranting Certiorari.	19

Contents

Page

B. The Petitioners' Fact-Based Disagreement With The Sixth Circuit Is Wrong And Does Not Warrant Certiorari. 20

C. Summary Reversal Is Not Appropriate. 25

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Cas. and Sur. Co. v. Leahey Constr. Co.,
219 F.3d 519 (6th Cir. 2000) 24

Bastian v. Petren Res. Corp.,
892 F.2d 680 (7th Cir. 1990) 21

Forsyth v. Hammond,
166 U.S. 506 (1897) 19, 20

Gibson v. Phillips Petrol. Co.,
352 U.S. 874 (1956) 25

In re Woods, 143 U.S. 202 (1892) 19

Harney v. Meadowbrook Nursing Ctr.,
784 S.W.2d 921 (Tenn. 1990) 2

Hodge ex rel. Skiff v. Hodge,
50 Fed. Appx. 22, 2002 WL 31478870
(2d Cir. 2002) 24

Laborers' Pension Fund v. A & C Envtl., Inc.,
301 F.3d 768 (7th Cir. 2002) 24

Lau Ow Bew v. United States,
144 U.S. 47 (1892) 19

Lawhorn & Assocs., Inc. v. Patriot Gen. Ins. Co.,
917 F. Supp. 538 (E.D. Tenn. 1996) 2

Cited Authorities

Page

NLRB v. Hendricks County Rural Elec. M'ship Corp.,
454 U.S. 170 (1981) 19-20

NLRB v. Waterman S.S. Corp.,
309 U.S. 206 (1940) 19

Price v. Mercury Supply Co.,
682 S.W.2d 924 (Tenn. Ct. App. 1984) 2

Rambus Inc. v. Infineon Techs. Ag,
318 F.3d 1081 (Fed. Cir. 2003) 24

Shelby v. Delta Air Lines, Inc.,
842 F. Supp. 999 (M.D. Tenn. 1993) 2

Stein v. Davidson Hotel Co.,
945 S.W.2d 714 (Tenn. 1997) 2

Tacon v. Arizona,
410 U.S. 351 (1973) 19, 20

Rules:

Fed. R. Civ. P. 50 ..... i, 18

Fed. R. Civ. P. 60(b) 15

U.S. S. Ct. R. 10 ..... 17, 19

RESPONSE TO STATEMENT OF THE CASE

As Petitioner Leon Wolford's Statement of the Case (Pet. 2-7) distorts the facts and history of this case, Respondent Massachusetts Mutual Life Insurance Company ("MassMutual") sets forth the following response.

A. The Termination Of Petitioner's Agent And Broker Contracts By MassMutual.

Wolford's recitation of the facts fails to describe the actual relationships among himself, MassMutual, and the MassMutual general agent, Tom King. Both Wolford and King had at-will contracts and as such had no contractual power to resist the decisions by MassMutual to sever all contractual relationships with Wolford by directing King to terminate Wolford's career agent and broker's contracts.

These relationships were established in written contracts. MassMutual had entered into an at-will contract with King to serve as its general agent in Eastern Tennessee. (J.A.I. 190-91).[1] King, in turn, had entered into an at-will contract with Wolford, to which MassMutual was a party, to serve as a full time MassMutual "career agent." (J.A.I 194) ("this contract may be terminated at will by the other, with or without cause"). Both contracts were terminable at any time for any reason.

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1. Two Joint Appendices were presented to the Sixth Circuit, reflecting the fact that MassMutual noted two appeals below that were consolidated for oral argument: "J.A.I" was filed in No. 01-5694, an appeal from the district court's denial of MassMutual's motion for judgment as a matter of law or for new trial, and "J.A.II" was filed in No. 02-6336, an appeal from the district court's denial of MassMutual's motion for new trial based upon newly discovered evidence.

Under Tennessee law, an at-will contract may be terminated at any time for any reason, "for good cause, bad cause or no cause at all," without liability to the terminating party. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Harney v. Meadowbrook Nursing Ctr.*, 784 S.W.2d 921, 922 (Tenn. 1990) ("The long standing rule in [Tennessee] is that an employee-at-will may be discharged without breach of contract for good cause, bad cause or no cause at all, without being thereby guilty of legal wrong."). Tennessee law also holds that a party to an at-will contract cannot be held liable in contract or tort for termination of the at-will relationship. *See Lawhorn & Assocs., Inc. v. Patriot Gen. Ins. Co.*, 917 F. Supp. 538, 543 (E.D. Tenn. 1996); *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999, 1015-16 (M.D. Tenn. 1993); *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 934 (Tenn. Ct. App. 1984).

The evidence was uncontroverted that, under this arrangement, while MassMutual was not the direct employer of Wolford and thus arguably lacked direct authority to terminate him, MassMutual still had control over him and had unquestioned power to cause his termination by directing King to do so. (J.A.I 1062-63, 1304-05). King himself acknowledged that he was obligated to implement MassMutual's directives and that any failure to follow directions would jeopardize his own status: "They would terminate me, if I didn't terminate him." (J.A.I 1090). Under the contracts, once MassMutual terminated King for refusing to terminate Wolford, it succeeded King as general agent and could terminate Wolford directly. *Id.*; J.A.I 195. King so testified, J.A.I 1090, and Wolford did not dispute this power.

MassMutual therefore had no need to engage in any "fraud" to trick King into inducing Wolford to resign in lieu

of termination. MassMutual had the power and ability to cause Wolford's termination for any reason or no reason. Nevertheless, when MassMutual was alerted to issues concerning Wolford's business practices, it chose to investigate and consider the allegations carefully, not because it lacked the power to cut Wolford loose, but as a sound business step to make sure that its decision was correct. Only by misrepresenting this history and miscasting MassMutual's legitimate effort to investigate him as a "fraud" does Wolford now claim error by the Sixth Circuit.

Wolford had been one of the top "producers" for the company, with particular success in marketing to coal miners a program of life, disability, and health insurance that he had devised as an alternative to worker's compensation insurance for the coal industry. (J.A.I. 896, 901, 905, 908, 1142). As Wolford's general agent, King also prospered from this business. (J.A.I 1024). The program had only limited application, as controlling state law restricted the right to opt out of worker's compensation to company officers. (J.A.I 918). Additionally, given coal miners' high rate of on-the-job injuries, MassMutual had underwriting requirements that prohibited issuing policies to a miner who worked more than six to eight hours per week underground. (J.A.I 1284).

In 1996, alerted by written complaints from a MassMutual agent, MassMutual began an investigation into whether Wolford had misrepresented coal miners' job titles or duties in disability insurance applications in order to obtain MassMutual underwriting approval. (J.A.I 410-14). At about the same time, MassMutual's disability claims unit had received an application for benefits for Grant Norman, a coal miner customer of Wolford's, which included a doctor's Attending Physician's Statement ("APS") that was completed

in two different handwritings. (J.A.I 417-18, 1268). Wolford ultimately *admitted* to MassMutual and at trial that he had added substantial information in his handwriting after the doctor had signed the form, without attribution, in violation of company rules. (J.A.I 983, 990). His explanation, that his additions reflected the doctor's views, did not mitigate the violation, as the rules prohibited alteration without attribution. *Id.*; J.A.I 1004-05.

MassMutual submitted these allegations to its Field Practices Review Committee, a high level committee comprised of representatives of different corporate divisions. The committee had authority to direct the general agent to terminate a career agent. (J.A.I 768-70, 1305).

After investigating the APS alteration, the committee chair wrote King on March 18, 1997 with directions to terminate Wolford's career agent contract, citing the APS alteration as cause for the termination. (J.A.I 439). The letter explicitly stated that Wolford could not receive a broker contract as an alternative. *Id.* Instead of following directions, King protested and sought further investigation. (J.A.I 1255-56). The Committee accommodated his request and directed its investigator to conduct additional interviews of coal miners and of Norman's physician. (J.A.I 1256-57). The investigator, Denis Hunady, MassMutual's most senior field investigator (lauded even by King as "one of the very best investigators in the industry" and a "human lie detector" (J.A.I 503)), reported to Field Practices that several miners had told him and a private firm hired to assist in the investigation that they had spent more than 50% of their time underground, that Wolford had known that fact, and that Wolford had used phony job titles in an apparent effort to circumvent the restriction of waiver of workers compensation

coverage to company officers. (J.A.I 678-81 [admitted for ID only], 1234-35, 1259-61). These statements, if true, would prove that Wolford knowingly submitted false and fraudulent applications to MassMutual.

Petitioner's statement to this Court – that the investigation was fruitless, that none of the miners testified to any wrongdoing by him, and that MassMutual cancelled their *de bene esse* depositions because of the lack of helpful testimony – is flat-out wrong. Three of the five miners testified that: (1) their insurance applications as prepared by Wolford were significantly inaccurate as to the nature of their job duties, their time underground, or their medical history; and (2) they had provided the correct information to Wolford. (J.A.I 1548 [Hunt] ("the information definitely was not accurate"), 1512 [Marcum] (testifying that the application contained inaccurate medical history); 1530-31 [Fritz] (affirming that, when Wolford was filling out the application, miner Fritz had warned, "That's not right, you know"), J.A.I 1536 (affirming that Fritz had spent "60 to 65" percent of his time underground)).

Hunady submitted a written report to the Field Practices committee summarizing evidence of misconduct by Wolford concerning six or more miners. At trial, Wolford successfully objected to this report and related testimony, claiming that it was hearsay, even though MassMutual had offered it as the basis for the decision to terminate Wolford and even though Wolford was allowed to introduce exculpatory evidence from that same investigation. His contention here, that the investigation was a "fraud," is absurd, as that charge rests upon his effort to keep the report from the jury – an egregious error compounded by the court's inexplicable decision allowing *him* to introduce similar evidence from the investigation.

The Hunady report found that Wolford had known of information that contradicted applications he had prepared for miners Francis (who reported to Hunady that he spent 80-85% of time underground); Hurley (75%); Fritz (60-65%; Wolford created misleading job title of VP for production); Anderson (50%); and Hunt (contrary to the "desk job" described in his application, his actual job was "hard physical work" maintaining mine equipment). (J.A.I 678-81). *See also* J.A.I 1259-61 (affirming findings for Hurley, Fritz and Anderson). Two miners (Fritz, Francis) confirmed these facts in written statements. (J.A.I 678-81). Hunady's proffered file included reports by an outside investigatory firm retained by MassMutual that not only were consistent with Hunady's findings but had also found another miner, Maggard, who worked 50-60% underground, contrary to his Wolford-prepared application claiming minimal time spent underground. (J.A.I 726-35, 729).

Hunady's findings were alarming to Field Practices. Misrepresentation of time underground meant that policies had been issued in violation of underwriting guidelines. Misrepresentation of job title raised the specter of improperly obtained waivers of mandatory workers compensation insurance. Although King and Wolford flew to Springfield and met with the committee to present their side of the facts (J.A.I 1030-34), Field Practices again concluded that it lacked confidence in Wolford and recommended that the company sever all relationships. (J.A.I 768-70).

On July 8 the committee again directed King, in writing, to terminate Wolford's contract. (J.A.I 463). MassMutual declined to provide King with details or grounds for its decision and instead said simply that it had "lost confidence" in Wolford. (J.A.I 463). King pressed for details but was told

only of serious concerns regarding the miner applications and the APS. (J.A.I 464). At trial, King affirmed that MassMutual consistently refused to provide him with details of the allegations against Wolford. (J.A.I 1030).

King, acting on his own, again avoided terminating Wolford. Instead of firing Wolford as directed, he allegedly called Wolford at home on Sunday, July 13, and told Wolford, contrary to MassMutual's instructions, that he expected that a direction would be "coming down" in the near future. (J.A.I 1047). King and Wolford both testified that King advised Wolford to avoid termination by resigning, thereby preserving Wolford's ability to enter into a similar agency contract with another AAA-rated life insurance company. (J.A.I 944-45; 1048). They also testified that King recommended that Wolford take a broker contract as an alternative to the career contract (notwithstanding the March 1997 letter advising King that MassMutual would not accept that alternative). *Id.* At trial, King claimed without substantiation to have telephoned three MassMutual executives soliciting support for his idea to switch Wolford to a broker's contract. (J.A.I 1043).

Wolford knew that he would be terminated if he did not resign. (J.A.I 944-45). He testified that he wrote out a short note resigning as a career agent (J.A.I 465), and the next day, July 14, signed an at-will MassMutual broker contract with King (J.A.I 466-67). According to his and King's testimony, two days later, on July 16, King wrote to Wolford advising him for the first time that MassMutual had directed King to terminate Wolford and that the March termination letter had warned "that [Wolford] would not be eligible for a broker's contract." (J.A.I 468-69). King stated in the latter that "I have not determined just how to go about pursuing

the broker's contract yet, but I will do so" and opined that "since you are vested your renewals [certain commissions] will continue" (a view which, it turned out, was mistaken) and that Wolford would not be hurt by aligning with another company. (J.A.I 468). Wolford did not protest or respond to this letter. Instead, he promptly signed a career agent contract with AAA-rated National Life of Vermont (J.A.I 531-63), with which he continued to sell insurance at standard commission rates.

MassMutual did not accept Wolford's switch to a broker contract. (J.A.I 470). Despite further efforts by King, on September 4 the home office wrote King and insisted that he terminate the broker contract. (J.A.I 473). This time, on September 22, 1997, King complied, finally ending the Wolford-MassMutual relationships. (J.A.I 474).

Wolford's fraud claim rests upon these allegations.

B. The Proceedings Below And Related Proceedings.

1. The Complaint And The Trial Evidence.

A few months after his termination, Wolford sued MassMutual for statutory and common law interference with his contractual relationship with King and for "fraudulently inducing the Plaintiff to resign his Career Contracts" through "the deception involving the assurance 'since you are vested your renewals will continue[.]'" (J.A.I 30). Thus, Wolford's fraud claim rested specifically on the statement by King in his July 16 letter, which, according to King and Wolford, was sent several days *after* Wolford had purportedly resigned on July 13 and signed broker's contracts on July 14, that Wolford could retain his vested commissions if he resigned

and entered the broker's contracts. That King made these alleged statements contrary to express directions and that King told Wolford that: (1) MassMutual previously had rejected the broker's contract option; and (2) that King had not yet figured out how to work around that obstacle (J.A.I 468) apparently was of no moment to Wolford.

The complaint did *not* allege the theory of fraud raised here, *i.e.*, that the Field Practices investigation was a sham intended to trick King and Wolford, through trumped-up allegations, into choosing resignation to avoid termination. *See* J.A.I 30. Wolford never amended the allegation, and the case proceeded to trial based on this "promise of commissions" theory set forth in the complaint, not the "fraudulent investigation" theory raised here.

At trial, which focused on the tortious interference claim, Wolford adduced no evidence of the dubious fraud theory. Previously, at deposition, Wolford had admitted that no specific promise was ever made by King that he would keep his commissions if he resigned and accepted broker's contracts: "Q: When would the conversation concerning vested commissions have occurred or was there a conversation? A: I don't believe that we actually had a specific discussion on that." (J.A.II 66-67). The trial testimony was no better. Wolford did *not* testify that commissions were discussed on July 13 or that he was induced to resign by a promise of commissions. Instead, he testified only that he was encouraged to resign and take a broker's contract in order to avoid termination and preserve his reputation and employability. (J.A.I 944-45). King likewise never testified that he promised Wolford commissions if he resigned. *See* J.A.I 1048. To the contrary, King said he didn't know if the issue had been discussed: "Q: Did you and Mr. Wolford ever talk about his commissions in the July 13th, 1997 telephone conversation? A: I don't know." (J.A.I 1099).

This fundamental lack of proof of a misrepresentation was compounded by an even greater flaw in Wolford's claim: the lack of any injury caused by the purported inducement to resign. From the filing of the complaint through closing argument, Wolford and King both insisted that Wolford had to resign to avoid termination. *See, e.g.*, J.A.I 28, complaint ("Faced with the options of resigning or being fired, Plaintiff had no alternative but to resign"); 78, opposition to summary judgment motion ("The only reasonable inference is to be drawn is that [sic] Wolford's contracts would have been terminated unless he resigned"); 1365 (closing argument at trial, where Wolford's counsel told the jury that Wolford's resignation was necessary to avoid certain termination). If Wolford would have been terminated anyway absent the resignation, the inducement to resign caused no injury.

Wolford's contention on appeal that King would not have proceeded with the termination had the Field Practices investigation not been a "fraud" is wrong. King never so testified. To the contrary, King testified at trial that he resisted complying with MassMutual's *initial* effort to terminate Wolford, which was for cause over the Norman APS, *not* the final June 8 directive by MassMutual to terminate Wolford at will. *See* J.A.I 1092 ("I wasn't being asked to terminate him at will. I was being asked to terminate him for filling in over a physician's signature. It would have been easier to terminate him at will"). *Compare also* J.A.I 439 (March 18, 1997 letter directing King to terminate Wolford for misconduct) *with* J.A.I 463 (final July 8, 1997 letter directing termination without providing cause). King admitted that, under Tennessee law, "you don't have to have a reason" to terminate an agent at will. (J.A.I 1031).

As to MassMutual's final termination directive of July 8, King's testimony was clear and unequivocal: he knew that he had to comply with the directive to terminate Wolford because he (King) would be terminated by MassMutual if he refused and MassMutual would then terminate Wolford directly: "They [MassMutual] were going to give me instructions to terminate him [Wolford]. ***They would terminate me, if I didn't terminate him. If . . . if they were to terminate me and get me out of the way, they could terminate him. They are the successor G.A.***" (J.A.I 1090) (emphasis added). Therefore, had Wolford not resigned, King would have terminated him, as King had no alternative in the matter. (J.A.I 1049-50).

The Petition never accounts for this dispositive testimony and instead quotes misleadingly from King testimony regarding the prior directive to terminate Wolford for misconduct. *See* Pet. at 11-13. Such testimony is immaterial. There is not the slightest shred of evidence that King would have defied MassMutual and triggered his own termination by refusing to terminate Wolford. And even if he had such an intent, MassMutual would have replaced him and fired Wolford anyway. (J.A.I 1050).

The whole thrust of the Petition therefore is groundless. There simply is no evidence that, as of July 8, King was willing to fall on his sword in a futile effort to protect Wolford from an at-will termination or that, had he done so, he would have deterred MassMutual from terminating him and Wolford alike. Wolford's at-will relationship with MassMutual was doomed no matter what course King and Wolford elected.

2. The Jury Verdict.

As Wolford requested, the jury was charged on whether King had fraudulently induced him to resign his career agent contract by promising him a broker contract and continued commissions: "The contested issues of fact are as follows: . . . . Whether the defendants through their agent Tom King intentionally motivated plaintiff to resign his career contracts ***with the inducement plaintiff would retain his commissions if he so resigned*** and by such inducement via Tom King the defendants intentionally misrepresented the facts." (J.A.I 1392) (emphasis added). The jury was not charged to consider whether the Field Practices investigation was a fraud. Thus, the "promise of commissions" claim was the lone fraud theory pled, tried, charged, and found by the jury.

Despite the glaring, fatal flaws in Wolford's case, the jury returned a mixed verdict. While it found that MassMutual was a party to the King-Wolford career agent contract, thereby precluding Wolford's tortious procurement claim as a matter of law (J.A.I 164), the jury found in Wolford's favor on fraud, issuing a general verdict with no specific findings and awarding Wolford $1.9 million in compensatory damages and $54.9 million in punitive damages. (J.A.I 167, 175).

After post-trial motions, the district court ordered a new trial on punitive damages unless Wolford accepted a remittitur to $7.6 million, which he did, conditionally. (J.A.I 805-07, 886). In the course of the post-trial proceeding, Wolford argued for the first time that the whole Field Practices investigation was a fraud (an assertion that has continuously evolved in appellate proceedings as well). The court accepted this and entered judgment on the fraud verdict, concluding

that King would not have terminated Wolford had Wolford not resigned and that King had been misled into recommending resignation. (Pet. App. 45a-47a).

3. New Evidence.

While the case was pending on appeal to the Sixth Circuit, but within the time period provided under Fed. R. Civ. P. 60(b), remarkable newly discovered evidence came to light: a tape recording of the key Wolford-King telephone call which proves that Wolford and King *never* discussed resignation of the career agent contract or retention of commissions by switching to a broker's contract. This recording flatly disproves the fraud claim and the sworn testimony of Wolford and King:

- On the tape, King did *not* suggest that Wolford resign in lieu of termination. Instead, King asked Wolford what he intended to do, and Wolford said that he had set up a dummy corporation with another agent whereby Wolford could continue to write MassMutual policies and collect commissions without disclosure to MassMutual. King liked the idea so long as the ruse proceeded unbeknownst to MassMutual. (J.A.II 329-31, 336, 348-49).

- King did *not* promise Wolford that if he resigned and entered a broker contract he would keep his commissions.

- Far from stating that he would support Wolford to the bitter end and would not terminate Wolford absent proof of legitimate cause, King flatly stated that "I've come [within] a gnat's ass at getting my own contract terminated on this thing." (J.A.II 331).

- King and Wolford both acknowledged that they had no alternatives other than the dummy corporation ruse. King asked if there were anything else that Wolford wanted him to do, and Wolford said, "Hell, there ain't nothing else to do, Tom." (J.A.II 331-32). King agreed. (J.A.II 332; *see also* J.A.II 348-49).

The tape flatly disproves Wolford's fraud claim. Indeed, King and Wolford repeatedly acknowledged that Wolford's relationship with MassMutual was ending and that he could stay with MassMutual only through a subterfuge of establishing a corporation that concealed his name, a ploy that King actually endorsed. Wolford was even prepared to use other carriers, whose contracts were waiting on his desk.

If that damning tape of the very conversation about which Wolford has cried "fraud" were not enough, the tape also recorded an earlier conversation between King and Gary McMahan of MassMutual's home office. At trial, King testified that, in this conversation, McMahan had blessed King's plan for Wolford to resign and switch to a broker's contract. (J.A.I 1040-43). The tape reveals a diametrically different conversation, proving beyond question that King knew that the termination was non-negotiable, that King accepted the order to sever ties with Wolford without regard to any finding by Field Practices, and that King had ***never*** cleared the broker contract with McMahan. For example, McMahan warned King that he had no option other than terminating Wolford: "I just don't know that you have any choice in the matter." King replied, "Okay." (J.A.II 353-54, 358). King accepted defeat, saying, "I don't think there's any question the call's been made." (J.A.II 359). He agreed to terminate Wolford accordingly. (J.A.II 359-60).

Thus, if the Wolford-King recording leaves any doubt as to King's marching orders or as to King's acquiescence, the McMahan-King recording is conclusive. It proves that McMahan did *not* authorize a broker contract and instead ordered King to sever the relationship, offering no explanation and giving King no option. Wolford's position here, that King was hoodwinked by MassMutual's accusations, flies in the face of the tape.

After discovering the recordings, MassMutual moved for a new trial under Fed. R. Civ. P. 60(b). The trial court denied the Rule 60(b) motion, ruling that the tape recordings were cumulative of the trial evidence and new evidence submitted by Wolford and King, namely affidavits that they had had many conversations during the period and that the substance testified to at trial must have occurred at some other date. (J.A.II 14). Wolford and King provided no details as to what was said or when, and instead simply submitted phone records showing a series of calls over several weeks. MassMutual appealed that ruling, and the Sixth Circuit consolidated the appeals for oral argument.

4. The Sixth Circuit.

Faced with this record, the Sixth Circuit unanimously reversed and directed entry of judgment in favor of MassMutual based upon Wolford's failure to prove any injury resulting from his resignation. (Pet. App. 1a-7a). Specifically, in an unreported opinion, the panel ruled that Wolford had failed to adduce evidence that King's suggestion that he resign had caused him any injury when the record was uncontroverted and replete with evidence that, had he not resigned, he would have been terminated, either by King or, if King refused, by MassMutual after firing King and

replacing him as successor general agent. *Id.* at 6a-7a. The Sixth Circuit concluded, "had the fraud not occurred, Wolford would not have resigned but King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without the nonvested commissions or other damages he claims." *Id.* at 7a.

In so ruling, the Sixth Circuit rejected the arguments as to King's supposed unwillingness to terminate Wolford, noting that: (1) King's protests against MassMutual's finding of misconduct referred to the earlier directive by MassMutual to terminate Wolford due to the Norman APS, not the final directive to terminate him at-will; (2) King's "uncontroverted testimony stated that he would have fired Wolford had he not resigned"; and (3) King's termination of Wolford's broker contract confirmed that intent. *Id.* at 7a & n.2.

Wolford petitioned the Sixth Circuit for rehearing, both panel and en banc, raising the same issues that he asserts in the Petition to this court. The Sixth Circuit denied that petition without a single judge voting for panel or en banc rehearing. Unwilling to give up his quest for an unjust multi-million windfall, Wolford now petitions this Court, raising the same fact arguments that the Sixth Circuit rejected.

REASONS FOR DENYING THE PETITION

As nothing more than a fact-based protest against the Sixth Circuit's well-reasoned opinion, the Petition fails to identify any issues warranting this Court's review. The petition should be denied for numerous reasons:

1. In abject disregard of the admonition in S. Ct. R. 10 that "[a] petition for a writ of certiorari is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law[,]" Petitioner asserts only fact issues and an alleged misapplication of the standard for granting judgment as a matter of law. He does not assert any legal issues requiring resolution by this Court, let alone significant unsettled questions of law that might warrant certiorari.

2. In his application for additional time to file the Petition, Wolford promised that he would present "important questions relating to an issue that has previously been recognized by this Court as dividing the [circuit] courts of appeals."[2] No such argument is raised here.

3. Petitioner does not assert a conflict between the circuits, nor does he contend that the Sixth Circuit has consistently departed from this Court's standards or that the general public would be affected. Instead, Petitioner presents

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2. *See* Application for Extension of Time (Aug. 2, 2004) at 1 (stating that the Petition would address "whether a federal or state standard applies when reviewing a federal district court's decision on a motion for judgment as a matter of law under Rule 50 . . . in a case founded on the diversity jurisdiction"). *Id.* at 1-2. The Petition fails to explain its failure to raise the grounds asserted in the Application.

a simple (and pedestrian) question of whether the Sixth Circuit erred in holding that a fraud verdict lacks sufficient evidence for submission to the jury under Fed. R. Civ. P. 50.

4. Petitioner's fact-based challenge to the Sixth Circuit's decision is wrong and disingenuous. He sidesteps the reasoning of the Sixth Circuit, ignores critical uncontroverted evidence that make his fraud claim illusory, and instead claims, erroneously, that the Sixth Circuit engaged in impermissible "reweighing" of the evidence. (Pet. at 2). To the contrary, the Sixth Circuit simply recognized fatal fact flaws in his claim, flaws that Petitioner conspicuously fails to cure here.

5. Petitioner's assertion that the Sixth Circuit ignored fact findings by the jury or otherwise engaged in factfinding, *id.*, is particularly specious. The jury's verdict was general and involved no specific findings that were "reweighed" or rejected by the Sixth Circuit. (J.A.I 167). Indeed, rather than show material fact disputes that the Sixth Circuit resolved in favor of MassMutual, Petitioner rests upon a *new* theory of fraud that he never presented to the jury let alone proved with substantial evidence.

6. Finally, Petitioner fails to advise the Court of the post-trial discovery of the damning tape recording of the very phone conversations that he claimed lay at the heart of the "fraud". The tape not only disproves his testimony but also makes clear that his entire fraud claim was itself a massive deception. This is but one of many alternate grounds available to the Sixth Circuit warranting reversal of the judgment against MassMutual.

In sum, this case involves a routine application of judicial review of sufficiency of the evidence. It is a wholly unremarkable decision in which an appellate court pierced through the smoke and mirrors of a bogus fraud claim and properly determined that it had no merit.

A. The Petition Does Not Present Any Issue Of Law Warranting Certiorari.

It scarcely needs to be said that a routine appellate review for sufficiency of the evidence does not constitute a "compelling reason" for certiorari as set forth in S. Ct. R. 10. This Court has consistently held that certiorari should be limited to cases of "gravity and importance," *In re Woods*, 143 U.S. 202, 206 (1892), or to secure "uniformity of decision," *Lau Ow Bew v. United States*, 144 U.S. 47, 58 (1892). The Court "do[es] not ordinarily grant certiorari to review judgments based solely on questions of fact." *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 208 (1940); *accord Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (noting that a question presenting "primarily a factual issue . . . does not, by itself, justify the exercise of certiorari jurisdiction").

Certiorari should not be used to create an extra layer of appellate review and thereby defeat the congressional purpose in creating courts of appeal. *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897) ("Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal."). Indeed, this Court typically dismisses petitions as improvidently granted after briefing and argument make clear that the case "presented primarily with a question of fact, which does not merit Court review." *NLRB v. Hendricks County Rural Elec. M'ship Corp.*, 454 U.S. 170, 177 n.8

(1981) (declining to consider whether lower court properly held that evidence supported a finding); *Tacon*, 410 U.S. at 352; *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918) (dismissing a petition as improvidently granted after determining that only issue in the case was "the propriety of submitting" certain questions to the jury which "depended essentially upon an appreciation of the evidence").

Certiorari should be granted

> only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Forsyth, 166 U.S. at 514-15. The Petition falls woefully short of this standard.

B. The Petitioners' Fact-Based Disagreement With The Sixth Circuit Is Wrong And Does Not Warrant Certiorari.

The Petition also should be denied because its criticism of the Sixth Circuit is wrong. Wolford asserts that the Sixth Circuit's analysis is "woefully insufficient" to overturn the jury's verdict and ignores substantial evidence. (Pet. at 9). In support, Wolford cites King's testimony that he relied on MassMutual's investigation and an inference, drawn from other facts, that MassMutual was motivated to terminate Wolford to avoid having to pay him commissions on a mistaken decision to pay coal miners. *Id.* at 10-13. These

facts do not add up to *any kind of fraud*, *nor does Wolford's* overall complaint, that the Sixth Circuit mistakenly considered whether Wolford would have had the same injury but for the alleged fraud. *Id.* at 16.

First, the Petition rests upon a distinction without a difference. Whether Wolford was induced to resign by an alleged promise of commissions or by an investigation of possible misconduct, the analysis is the same. As the Sixth Circuit recognized, uncontroverted evidence demonstrated that Wolford's at-will relationship with MassMutual was doomed no matter what facts had been communicated to King. The uncontroverted evidence is that even if Wolford had done nothing, he would have been terminated by King directly or by MassMutual after terminating King and succeeding him as Wolford's general agent. (J.A.I 1090). Those outcomes would not have changed regardless of what King was told about possible misconduct by Wolford. Had King balked, MassMutual would have terminated King, replaced King as general agent, and then terminated Wolford directly. King so testified ("They would terminate me, if I didn't terminate him") (J.A.I 1090). The bottom line is the same: switching from one doomed at-will relationship (career agent) to another doomed at-will relationship (broker) caused Wolford no cognizable injury. *See, e.g., Bastian v. Petren Res. Corp.*, 892 F.2d 680, 684-85 (7th Cir. 1990) (if plaintiffs would have been injured "regardless of the fraud, any award of damages . . . would be a windfall").

Second, this red herring theory is remarkably devoid of evidence. Indeed, the evidence is starkly to the contrary. According to Wolford, the Field Practices investigation was a sham designed to intimidate him into resigning to avoid

termination by King. But the Field Practices investigation was conducted to enable *MassMutual*, not King, to decide whether to terminate Wolford's contract. MassMutual did not try to convince King that Wolford had committed misconduct and should be terminated for cause. To the contrary, it was King who consistently sought an explanation for the decision and who repeatedly complained about the lack of information from MassMutual. (J.A.I 458-60, 464, 1030, 1034-38, 1103-05). King even testified that, while he opposed the process, and was dissatisfied by the lack of specific grounds, "I am satisfied that they, based on the information that they understood they had, that they had a right to request a termination." (J.A.I 1104). Similarly, there is not a shred of evidence that MassMutual mentioned resignation to King, let alone plotted to trick King into pushing Wolford to resign. To the contrary, King testified that the broker's contract was *his* idea, and that he called MassMutual executives to sound them out on it. (J.A.I 1042-44). It defies all logic (not to mention the evidence) to suggest that MassMutual rigged the Field Practices investigation as a ruse to induce King to suggest resignation to Wolford, contrary to MassMutual's repeated written directives to terminate Wolford.

Wolford offers no evidence that such a far-fetched conspiratorial scheme ever existed. While he criticizes the Field Practices investigation and contends that its findings were erroneous, he offers no evidence that these were deliberately plotted by individuals, known or unknown, as a subtle ploy to induce King to induce Wolford to resign months later. Indeed, Wolford has not, and cannot, point to a single piece of evidence indicating that MassMutual *ever* preferred that Wolford resign. This theory is simply a far-fetched fantasy developed after the verdict to mask the fatal holes of his fraud claim.

Third, Wolford *never* presented his "Field Practices investigation" theory of fraud to the jury, and the trial court did not include it in its jury instructions, charging the jury instead to determine whether Wolford was falsely promised renewal commissions as an inducement to resign. (J.A.I 1392). Wolford never articulated this claim in his Trial Memorandum (J.A.I 104-05), Pretrial Order (J.A.I 154), or even in his closing argument (J.A.I 1365, 1375-76).

Fourth, Wolford's new fraud theory flies in the face of his successful effort to keep the damning Field Practices investigation results from admission into evidence. If the investigation was a sham as alleged, Wolford had no arguable basis for preventing the jury to know how the investigation was conducted and what evidence of wrongdoing it reported to MassMutual. Indeed, the ample evidence of serious misconduct and fraud unearthed by Hunady would have fully justified termination for cause had MassMutual so elected.

Fifth, Wolford's citation to MassMutual's allegedly nefarious intent to snatch his commissions (Pet. at 12-13) egregiously misstates the record. While he contends that "MassMutual admitted that the real reason [he] was losing his commissions was to compensate for the claims for benefits from his clients" (Pet. at 13), neither the cited reference, J.A.I 1059, nor any other evidence contains such an admission. The citation refers to a call that King reportedly made to MassMutual sometime in August, *after* the termination decision had been made, to ask why Wolford could not keep his commissions. Thus, it refers to whether Wolford could retain commissions even after he had been terminated, not whether retention of commissions were a motive for his termination.

Sixth, Wolford continues to ignore the lack of direct evidence in support of the fraud claim that *was* submitted to the jury: the allegedly false promise of renewal commissions.

Thus, the Sixth Circuit did nothing to "usurp[] the jury's fact-finding function" or to "misapprehend[] the essence of the cause or the effect of the fraud" or to misapply "the substantive state law remedy for fraud." (Pet. at 15). It simply addressed the fatal flaws in Wolford's case, flaws that no amount of smoke-and-mirror misdirection can fix.

Wolford's final contention, that the Sixth Circuit should have deferred to the trial court's lengthy analysis, also is wrong. Appellate review of denial of a Rule 50 motion is *de novo*. Courts of appeal often are called upon to reverse a jury verdict of fraud that lacks sufficient evidence even though the district court affirmed the verdict in its post-trial review.[3] In any event, the mere fact that the trial court's opinion was long does not make it correct. Like Wolford,

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3. *See, e.g.*, *Rambus Inc. v. Infineon Techs. Ag*, 318 F.3d 1081, 1105 (Fed. Cir. 2003) ("In sum, substantial evidence does not support the jury's verdict" as plaintiff 'did not show the first element of a Virginia fraud action[.]' . . . No reasonable jury could find otherwise. The district court erred in denying JMOL of no fraud on the . . . verdict."); *Laborers' Pension Fund v. A & C Envtl., Inc.*, 301 F.3d 768, 784 (7th Cir. 2002) (reversing denial of motion for judgment as a matter of law because "as a matter of law, A & C did not prove fraud in the execution"); *Hodge ex rel. Skiff v. Hodge*, 50 Fed. Appx. 22, 24, 2002 WL 31478870, at *2 (2d Cir. 2002) (reversing denial of motion for judgment of fraud because "there is no evidence in the record" of "false representations of fact"); *Aetna Cas. and Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 547 (6th Cir. 2000) (reversing district court's denial of motions for judgment as a matter of law with respect to the claims of fraud, conspiracy to commit fraud, and aiding and abetting fraud).

the court erred by failing to accept the fact that, under the pertinent contract terms and Tennessee law, neither Wolford nor King had the power to prevent MassMutual from terminating its at-will relationship with Wolford.

C. Summary Reversal Is Not Appropriate.

Wolford's request for summary reversal of the Sixth Circuit's decision warrants little comment. Suffice it to say, no decision on the merits should be made without affording the Court an opportunity to review the actual record. Wolford's misleading discussion of the facts certainly provides no basis for any such ruling. In any event, the only authority cited for this extraordinary request – a short-lived set of four half-century-old per curiam summary orders in FELA cases – hardly applies here. Justice Frankfurter's stinging dissent in the last of these obscure rulings aptly pointed out the manifest error in such actions, and the practice stopped. *See Gibson v. Phillips Petrol. Co.*, 352 U.S. 874, 875-76 (1956) (Frankfurter, J., dissenting).

Indeed, Wolford's claim of a serious injustice is badly misplaced. The Sixth Circuit picked just one of many alternate grounds for reversal. Numerous other grounds also exist: the Tennessee law of at-will contracts, the lack of an actionable misrepresentation of fact, the court's refusal to admit into evidence the actual results of the supposedly fraudulent investigation, and counsel's prejudicial argument that allowed the jury to award punitive damages to punish lawful counterclaims by MassMutual. But one issue stands out in particular: the newly discovered tape recordings of the very telephone conversations in which MassMutual allegedly made its fraudulent inducements. They flatly disprove the alleged misrepresentations and instead

demonstrate outrageous fraud by Wolford and King. Having himself perpetrated an odious deception on the courts, Wolford surely warrants no special treatment here.

CONCLUSION

This case presents a routine, pedestrian issue of sufficiency of evidence that does not warrant certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

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